Now what is the attitude of the respondent? He has lodged a cross-appeal but it is not from the order disallowing the accounts, etc. of the three disassociated businesses. It is only from that part of the order which directs that each party should bear its own costs not only in the matter of the variation of the order but also in the matter of his application for a writ of attachment. Insofar as the appellant's appeal is concerned, he naturally seeks to uphold the judgment and order of the High Court but the absence of any appeal on his part from the substantive order for a variation must mean that the respondent no longer contends that the judge has no powers to amend or vary a consent order that has been drawn up and perfected, in all the circumstances of the case, where there is an error on the part of the applicant only. But somewhat inconsistently, he so contends at the hearing of the appeal.

But, of course, an appeal is by way of rehearing and it is still for this court to say whether a trial court may amend a perfected consent order and whether in the circumstances of the case it is correct to do so.

Under Order 28 rule 11 Rules of the Supreme Court, the general rule is that consent orders may be set aside wholly or in part in a fresh action upon such grounds as would enable the court to set aside or rectify an agreement, as for instance, fraud or mutual mistake: *Huddersfield Banking Co.* v. *Hg. Lister & Sons*[4] and *Wilding* v. *Sanderson.*[5] Interlocutory orders stand in the same position as final orders and cannot be altered save by means of an appeal: *Kelsey* v. *Doune;*[6] *Dawson* v. *Hill.*[7] Under Order 37 rule 1G, the court may, on sufficient cause being shown revoke or vary by a subsequent order an order made or given at or before the trial, in the circumstances set out in rules 1A to 1F of this Order, but they do not apply to this case.

This case is one of mistake on the part of one of the parties and the case relied on by the appellant is *Mullins* v. *Howell,*[8] in which Sir George Jessel M.R. held:

"I have no doubt that the court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the court having a sort of general control over orders made on interlocutory application."

In 1970, Ormrod J. (as he then was) approved and adopted the above dictum of Sir George Jessel M.R. quoted above: *B(GC)* v. *B(B.A.)*[9] at page 916.

We now come to the nub of the appeal. Should the appellant be ordered to make discovery and give inspection from January 1, 1962 or only from January 1, 1974. On the concession by the respondent that there are settled accounts for the period January 1, 1962 to December 31, 1973 and in the absence of any allegations of fraud in the statement of claim and having regard to the withdrawal on the part of the respondent of any averment of wilful neglect or default by the appellant, it is, in our view, clear that the proper order should have been production and inspection from January 1, 1974.

The appeal is therefore allowed, but in allowing the appeal, we would make it clear, as it must be obvious, that there is nothing we have decided so far to prevent the respondent by suitable amendments from applying at an appropriate stage to re-open the settled accounts on adequate proof of facts that will permit settled accounts to be opened.

As for the costs of the appeal, the appellant shall have them, subject however to the following. We do not think we should embark on a discovery of who was responsible for the appeal record. If it was the solicitors for the respondent who had insisted on including in the record so much of the unnecessary material which counsel for the appellant did not find necessary to refer to in his submission, we would have expected such advice from the Bar that the inclusion was under protest as was given in *Lim Siew Neo (f)* v. *Pang Keah Swee.*[10] In the absence of such advice, the cost of preparing the record of appeal will be trimmed by a half. But the order of the High Court that the costs of the proceedings there should be borne by the parties themselves shall stand. The appellant is not entirely free from responsibility for the events that have happened.

We now turn to the cross-appeal. It should not detain us much longer. It is an appeal from an order of costs. Section 68(1) of the Courts of Judicature Act, 1964 provides

"68(1) No appeal shall be brought to the Federal Court in any of the following cases:

....

(c) where the judgment or order relates to costs only, which by law are left to the discretion of the court, except with the leave of the Federal Court or a judge of the High Court."

No such leave has been obtained. The appeal fails *in limine.* But we would say also that if the matter was before us, we would, having regard to the course of events that had taken place, agree respectfully with the order made. The cross-appeal is dismissed with costs.

Order accordingly.

Solicitors: *Balasundaram & Co.; Thillaimuthu & Phock Kin.*

GOVALAN v. KUALA LUMPUR - KEPONG AMALGAMATED LIMITED

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J., & Abdul Hamid J.) June 2, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 59 of 1976]

Industrial Law — Injury to worker in factory — Worker feeding rubber into machine without authority — No negligence or breach of statutory duty — Factories and Machinery (Fencing of Machinery and Safety) Regulations, 1970 reg. 23(9) — Factories and Machinery (Factories and Machinery Person in charge) Regulations, 1970, reg. 9 — Factories and Machinery Act, s. 20.

In this case the appellant was injured when he fed rubber into a machine without authority in the factory where he was working. The learned trial judge found that the appellant's duty at the material times was to clean the floor in the factory, that he had never been asked to operate the machinery and that he had sustained the injury when he

fed rubber into the machine without authority and as he was not trained to do so. He therefore dismissed the claim of the appellant for damages arising out of the injury to his right hand. The appellant appealed to the Federal Court.

Held: (1) the learned trial judge was correct in his findings of fact that the appellant fed rubber into the machine without authority and as he was not trained to do so injured himself;

(2) even if there had been a statutory breach of the Factories and Machinery (Fencing of Machinery and Safety) Regulations that did not cause or materially contribute to the injuries;

(3) there had been no breach of the Factories and Machinery (Factories and Machinery Person-in-charge) Regulations, 1970, in this case.

Case referred to:-

(1) *Bonnington Castings Ltd.* v. *Wardlaw* [1956] A.C. 613.

HIGH COURT.

K.L. Rekhraj for the plaintiff.

C. Abraham for the defendants.

Cur. Adv. Vult.

Harun J.: The plaintiff's claim is for damages for personal injuries sustained whilst at work in the defendants' rubber factory as a result of the defendants' negligence and/or breach of statutory duty.

The facts are as follows: The plaintiff was nearly 17 years of age and on February 12, 1971 it was his first day at work. There are three shifts at the rubber factory viz.:

(i) 6.00 a.m. to 2.00 p.m.

(ii) 2.00 p.m. to 10.00 p.m.

(iii) 10.00 p.m. to 6.00 a.m.

The plaintiff was working in the second shift. From 2.00 p.m. to 6.00 p.m. he worked outside the factory and after the evening meal break he worked inside the factory from 6.30 p.m. moving rubber into the water tank. It was the practice at the factory that at about 15 minutes before the end of each shift, the workers would begin cleaning up the work area for the next shift to come in and also to clean themselves up in the toilets/bathrooms in the factory. Plaintiff sustained his injury during this cleaning-up period — i.e. at about 9.45 p.m. There is a battery of three machines at the factory:

Machine No. 1 — is a maceratory into which lumps of rubber are first fed in;

Machine No. 2 — is a crepe machine into which rubber which has been turned into sheets by Machine No. 1 is fed in; and

Machine No. 3 — is another crepe machine into which the crepe rubber from Machine No. 2 is fed in to make it more thin before being put on conveyor belts for cutting.

As the factory works round the clock the machines are not stopped, in particular the machines, which are driven by electric motors, are left running in between shifts.

The plaintiff's right hand was caught in the nip of the rolls and crushed. The hand was amputated at the wrist the same night. So much of the evidence is not in dispute.

According to the plaintiff at about 9.30 p.m. one of the workers asked him to feed lumps of rubber into the machine. He pushed a heap of rubber lumps with his right hand and as he did so his foot slipped on the watery floor throwing his body forward and his right hand into the machine. Examining his evidence, it would appear that on his very first attempt to feed rubber into the machine the accident occurred. His cries of pain were heard when most of the workers were in the bathrooms. This means that the accident occurred about 9.45 p.m. He was injured by Machine No. 2. I find plaintiff's version of the accident improbable for following reasons:

(i) It was clean-up time and therefore most unlikely for anyone to want to feed more rubber into the machine;

(ii) Rubber lumps are fed into Machine No. 1 and not Machine No. 2;

(iii) There is no point in feeding rubber into one machine because the process is that it must go through all three machines;

(iv) At no time until the trial, either in his report to the Inspector of Machinery or in his pleadings did the plaintiff allege that he slipped or that the floor was slippery as the primary cause of the accident.

I accordingly found as a fact that plaintiff's duty at the material time was to clean the floor in the factory. He had not been asked to operate the machine. He had not slipped whilst cleaning the floor and thereby injured by the machine. He had in fact without authority on his own fed the rubber into the machine and as he was not skilled to do so injured himself. I am further satisfied on the evidence of the Inspector of Machinery, his report and the evidence of other witnesses that there has been no breach of the Factories and Machinery (Fencing of Machinery and Safety) Regulations, 1970 or of the Factories and Machinery Act by the defendants. On the other hand I am satisfied that in this case it was the plaintiff who committed a breach of section 20(2) of the Factories and Machinery Act as he did wilfully and without reasonable cause acted in a manner so as to cause bodily injury to himself.

I accordingly held that the defendants were not negligent or committed a breach of statutory duty and that the plaintiff was entirely to blame for the accident. In the event I dismissed the claim with costs.

From the above judgment the plaintiff appealed to the Federal Court.

FEDERAL COURT.

K.L. Rekhraj for the appellants.

C. Abraham for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J.: The appellant who was nearly 17 years of age at the time of the accident had sued defendant for damages arising out of an injury to his right hand.

It was the appellant's first day at work when the accident took place. He was working on the second

shift which was between 2.00 p.m. and 10.00 p.m. During the second half of that shift from about 6.30 p.m. he worked inside the factory moving rubber into a water tank. It was the practice of the factory that about 15 minutes before the end of shift workers would clean up the work area for the next shift and also clean themselves up in the toilets/bathrooms in the factory. The appellant sustained his injury during this cleaning-up period at about 9.45 p.m. There was a battery of three machines at the factory each being successively used in the milling of rubber.

According to the appellant he had been asked by one of the workers to feed lumps of rubber into the machine. Evidence would clearly show that this was machine No. 2. For reasons clearly set out by him in his judgment the learned trial judge dismissed the appellant's version of the accident as being improbable. He held that the appellant's duty at material times was to clean the floor in the factory; he had never been asked to operate the machine and that he never slipped while cleaning the floor and thereby incurred injury; and that he had in fact without authority fed the rubber into the machine and as he was not trained to do so injured himself.

I see no reason to disagree with the learned judge's finding of the facts and indeed the finding in this respect was not seriously challenged.

There remains 2 grounds of appeal which could be and were strenuously argued. It was firstly argued that the trial judge had erred in law and in fact in holding that there had been no negligence or breach of statutory duty — that there had been a breach of a requirement of the Sixth Schedule — Regulation 23(9)(a)(i) of the Factories and Machinery (Fencing of Machinery & Safety) Regulations, 1970.

The breach complained of was the presence of planks forming a sort of platform in the neighbourhood of the milling machines which counsel for the appellant said has caused a variation of the height of 39" of dimension "C" therein by lessening it.

In the first place it should be noted that dimension "C" may be varied by the Chief Inspector to suit conditions in any particular installation where adherence to such dimension is not practicable. The Inspector (DW1) himself explained (P.35A of the notes) that if the operator is below 5' tall or above 6' tall this height has to be varied. The presence or effect of these planks was not raised during his cross-examination by the appellant's counsel. Indeed DW1 did say that he was satisfied these regulations had been complied with.

Subramaniam, the worker on Machine 2 the machine on which the plaintiff hurt his hand said that machine operators stood on the planks whilst they worked. The planks he said served to keep their feet dry and the milled rubber clean.

Mohanathan DW4 also testified to the presence of this plank "platform" which he said was 4" to 6" high. He worked on Machine No. 1 to feed rubber into which he said one would have to stand on the platform. However for Machines Nos. 2 and 3 one may or need not use the platform. In re-examination he conceded that one could feed all the machines either from the platform or the cement floor. DW5 Abu Bakar, another shift supervisor confirms the presence of the plank platform.

Strange to say the plaintiff made no mention of this plank platform whatsoever. He claimed that whilst feeding rubber into the machine he slipped on the watery floor and his right hand was caught in the machine.

Mr. Abraham cites the decision in *Bonnington Castings Ltd.* v. *Wardlaw*[1] as authority for the proposition that a plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury. In that case the employment of a steel dresser exposed him to silica dust emanating from the pneumatic hammer at which he worked and also from swing grinders. It was held that the onus of proof lay on him to show, by the ordinary standard of proof in civil actions, at least that on a balance of probabilities the breach caused or materially contributed to the injury and not merely that it was possible that the injury might have been so caused.

I am not at all satisfied that on the balance of probabilities, assuming that there had been a statutory breach in this case it had caused or materially contributed to the injuries. Indeed it would seem that if the presence of the plank platform constituted a statutory breach even in respect of employees toying with the machines without authority, the plaintiff's evidence inclined me to the view that he had stood not on the platform but on the cement floor while feeding the machine so that the breach had not in fact endangered him.

The appeal on this ground must therefore fail.

In addition I would say that the fact that the dimension "C" may be varied at the direction of the Chief Inspector would tend to show that strict adherence to the height nominally prescribed is not considered by the legislature as an essential element for safety.

Next it was suggested that there had been a breach of rule 9(1) & (2) of the Factories and Machinery Act, 1967 (Factories and Machinery Person-In-Charge) Regulations, 1970, it being alleged that the machines had been left running and unattended whilst the operators were washing themselves.

The plaintiff admitted that he had not observed whether there were other persons working on the other machines but that at the machine which caused the injury there was a machine operator who only left the place after asking the plaintiff to feed rubber into the machine.

Subramaniam DW3 said that he was the one who was feeding the machine with rubber and was present at the time the plaintiff caught his hand in it. He said he did not know why the plaintiff had approached the machine. The learned trial judge believed him when he held that having heard the evidence of the various witnesses he accepted among other things that there had been no breach of the abovementioned rules. On

the question of breach of this particular statutory duty I am of the view that we need concern ourselves only with Machine No. 2, and not the other two machines.

I would therefore with respect agree with the learned judge's finding in this respect as well.

The fourth ground having been abandoned by the appellant, I need not dwell upon it. I would therefore dismiss this appeal with costs.

Lee Hun Hoe C.J. (Borneo) and **Abdul Hamid J.** concurred.

Appeal dismissed.

Solicitors: *K.L. Rekhraj & Co.; Shearn Delamore & Co.*

YUSON BIEN & ANOR. v. BANKERS TRUST CO. LTD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Abdul Hamid J.) March 22 & June 2, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 164 of 1977]

Contract — Rectification — Mutual Mistake — Sale of land — Intention of parties.

In this case the appellant had applied to rectify an agreement by including two pieces of land described as Lots 40 and 85 situated at Temple Street, Malacca on the ground of mutual mistake. On the facts it appeared that the respondents, the executors and trustees of the estate of Chua Yau Keng deceased had obtained a court order for the sale of all or any of the immovable properties of the estate by public auction or by private contract. They caused a valuation of the properties to be prepared and this stated that the two lots had been sold and no longer belonged to the estate. The respondents relied on the valuation reports and never intended to sell the two lots, which they considered did not form part of the estate. The appellants had agreed to buy the properties belonging to the estate. In the draft agreement the two lots were included by mistake but subsequently they were deleted and the agreement signed and duly engrossed. Later it was discovered that only part of the two lots had in fact been sold and that the two lots still belonged to the estate. The learned trial judge dismissed the claim of the appellants and they appealed to the Federal Court.

Held: the learned trial judge was right to refuse rectification as there was no equitable ground for making an order of rectification. There was no question of mistake on the part of the respondents and so the claim of mutual or common mistake could not succeed.

Cases referred to:-

(1) *Tucker* v. *Bennett* (1887) 38 Ch. D. 1 at p. 9.
(2) *Shelburne* v. *Inchiquin* (1784) 1 Bro. C.C. 338, 341.
(3) *Foscelyne* v. *Nissen* [1970] 2 Q.B. 86 at p. 98.
(4) *Marquis of Breadalbane* v. *Marquess of Chandos* (1837) 2 My. & Cr. 711.
(5) *Lloyd* v. *Stanbury* [1971] 2 All E.R. 267; [1971] 1 W.L.R. 535.
(6) *Goody* v. *Baring* [1956] 1 All E.R. 11, 12.
(7) *Smith* v. *Mansi* [1962] 3 All E.R. 857.
(8) *Earl* v. *Hector Whaling Ltd.* [1961] 1 Lloyds L.R. 459, 471.
(9) *Crane* v. *Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662.
(10) *Tucker* v. *Bennett* (1887) 38 Ch. D. 1, 9.
(11) *Swaisland* v. *Dearsley* (1861) 29 Beav. 430.
(12) *Tamplin* v. *James* (1880) 15 Ch. D. 215, 217.

HIGH COURT.

N. Ramachandran (*P. Devadas*) with him for the plaintiffs.

Dato Wong Seng Chow for the defendants.

Cur. Adv. Vult.

Ajaib Singh J. (after stating the facts and the evidence continued): On the evidence before me I am not at all satisfied that the plaintiffs have proved their case against the defendants. The court no doubt has jurisdiction to rectify an agreement which because of a common mistake of fact does not substantially represent the real intention of the parties when the agreement is finally drawn up. But there must be a prior common and continuing intention of the parties as to their real intention right up to the time of the written agreement and the burden of proving this intention is upon the plaintiffs. As to the burden and standard of proof which is required in such a case I can do no better than to quote *Cheshire and Fifoot's* Law of Contract, Eighth Edition, at page 219 as follows: —

"The burden of proving this common and continuing intention lies upon the party who claims that the written contract should be rectified.(1) As regards the standard of proof required all that can be said is that the claim will fail unless the common intention upon which it is based is proved by *convincing* evidence. It is not necessary that the evidence should be 'irrefragable' as Lord Thurlow once suggested,(2) or that it should settle the question 'beyond all reasonable doubt' as is demanded by the criminal law.(3) If the negotiations leading up to the execution of the written instrument were vague and inconclusive, so that it is impossible to ascertain what the parties really meant, then the writing represents the only agreement that has been concluded, and there is no antecedent and common intention upon which rectification can be based.

Moreover, it must be shown that the alleged common intention, though once undoubtedly reached, continued unchanged down to the time when the instrument was reached. Proof that the parties varied their original intention and that the instrument represents what they finally agreed is fatal to a suit for rectification.(4)

Finally, it must be emphasized that the issue relates not to the individual intention of the parties, but to their common intention. If the defendant can satisfy the court that he understood the agreement to be exactly what was stated in the written instrument, rectification will be excluded."(5)

In my view the plaintiffs have with regard to the two disputed lots failed to prove by convincing evidence that it was the common intention of the parties that the two lots should form part of the properties to be sold. The negotiations leading to the final agreement of March 27, 1965 were vague and inconclusive insofar as the two disputed lots are concerned. Earlier when the draft agreement was drawn up both Mr. Keith Sellar and Messrs. Laycock & Ong as well as the defendants were aware of the two valuation reports in which the two lots were not valued at all and were stated to have been sold. The omission on the part of the defendants and their solicitors to comment on the draft agreement which listed the two disputed lots in the schedule as well as their omission to comment on Mr. Keith Sellar's letter that the two lots appeared to have been sold do not prove anything. Silence is not equivalent to acceptance of any fact nor does it conclusively prove any intention. So too with regard to the defendants' letter dated February 21, 1966 (Exhibit P5A) addressed to the tenant of 15